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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT
 SAN FRANCISCO DIVISION

VISA U.S.A. INC.,

Plaintiff/Counterclaim
 Defendant,

v.

MARITZ INC., d/b/a MARITZ
 LOYALTY MARKETING,

Defendant/Counterclaim
 and Third-Party Plaintiff,

v.

CARLSON MARKETING GROUP, INC.

Third-Party Defendant.

CIVIL ACTION NO. C 07-5585 JSW

RESPONSE OF DEFENDANT/
 COUNTERCLAIM PLAINTIFF MARITZ INC.
 TO EVIDENTIARY OBJECTIONS OF
 PLAINTIFF/COUNTERCLAIM DEFENDANT
 VISA RELATING TO THE DECLARATIONS
 OF MARK PETERMAN, KELVIN TAYLOR
 AND DORIS LYONS

1 Defendant/Counterclaim Plaintiff Maritz Inc. (“Maritz”), for its responses to the
 2 objections of Plaintiff/Counterclaim Defendant Visa U.S.A., Inc. (“Visa”) to the Declarations of
 3 Mark Peterman, Kelvin Taylor and Doris Lyons, states as follows:

4 **DECLARATION OF MARK PETERMAN**

5 **1. Evidence to Which Visa Objects: Paragraph 5 (2:24-3: 5):** “More
 6 specifically, when I called Mr. Fordyce on July 20, 2007, I told him that we (Maritz) wanted to
 7 make sure that our expectations were set correctly for the meeting on July 24, that I wanted to
 8 confirm that he had our invoices and the detailed back-up to our invoices (relating to the
 9 approximately \$5.2 million that Maritz was owed), and to let him know that we would be
 10 prepared to discuss the invoices. He confirmed that he had our invoices and the back-up, and
 11 that was what they were coming to discuss. He indicated that Visa did not share our perspective
 12 as to the amount owed on the invoices, but never said anything indicating that Visa believed that
 13 Maritz should pay anything or that Maritz owed tens of millions of dollars. My clear
 14 understanding based on my conversation with Mr. Fordyce was that Visa was willing to pay
 15 Maritz something, but not the full amount that Maritz believed Visa owed.”

16 **Maritz’s Response:** The evidence is relevant; FRE 402. The evidence provides further
 17 support for Maritz’s position that Visa was concealing from Maritz that Visa never intended to
 18 pay Maritz any money and, instead, was claiming Maritz owed tens of millions of dollars.

19 In addition, this July 20, 2007 conversation is further relevant because it took place the
 20 day after Visa’s counsel Mr. Thompson sent Mr. Gallant a letter, dated July 19, 2007, in which
 21 Mr. Thompson enclosed Visa’s proposed “Alternative Dispute Resolution Protocol” (See Gallant
 22 Decl. ¶ 23, *see also* Exh. E to the Declaration of Ryan S. Hilbert in Support of Maritz’s Motion
 23 to Stay Arbitration (containing a copy of the July 19 letter and the proposed Protocol)). Visa’s
 24 July 19 proposed Protocol stated that “discovery should be minimized” and, more specifically,
 25 did not provide for any fact witness deposition discovery or any document requests. Visa’s
 26 proposed Protocol thus reflected a further effort by Visa to severely restrict Maritz’s rights at a
 27 time when Visa was still concealing its claim that Maritz owed tens of millions of dollars.

28 Mr. Gallant was out of the office on vacation and therefore did not review

1 Mr. Thompson's July 19 proposed Protocol until July 23, 2007. Upon reviewing the proposed
 2 Protocol, Mr. Gallant noticed it provided that "[e]ach Party claims the other should make a
 3 payment to resolve the dispute" (Gallant Decl. ¶¶ 23-25). That surprised Mr. Gallant and
 4 prompted him to follow up (*Id.*). Only then did Visa finally reveal it was claiming Maritz owed
 5 tens of millions of dollars (*Id.*). As a result, Mr. Gallant never signed Visa's Protocol.

6 **2. Evidence to Which Visa Objects: Paragraph 7 (3:9-15):** "I had had numerous
 7 discussions with Tad Fordyce and other Visa personnel in late 2006 through Visa's termination
 8 of the Agreement in the Spring of 2007. At no time had anyone from Visa told me that Visa
 9 believed or was claiming that Maritz owed Visa tens of millions of dollars or that liquidated
 10 damages were accruing. In fact, I knew in the first part of November 2006 that Visa had agreed
 11 to waive liquidated damages and that the parties had agreed, in light of the numerous problems,
 12 difficulties and delays encountered in connection with the Visa project, that Maritz was
 13 proceeding on a 'best efforts' basis."

14 **Maritz's Response:** Visa's objections should be overruled. The evidence is relevant in
 15 several respects and admissible under FRE 401 and 402. The evidence helps demonstrate why
 16 Maritz reasonably believed, prior to signing the July 9, 2007 letter, that Visa was not making
 17 claims against Maritz for tens of millions of dollars. The evidence is further relevant (a) because
 18 it suggests Visa was deliberately concealing this information from Maritz, and/or (b) in light of
 19 Mr. Gallant's Declaration in which he states that if such claims had been made by Visa, he
 20 would have been made aware of them (See Gallant Declaration, ¶ 36(a)).

21 Visa's remaining objections are also without merit. Mr. Peterman's Declaration
 22 establishes he was heavily involved in the Visa Extras Rewards Program project from
 23 approximately August 2006 until after Visa terminated the MSA in Spring of 2007. His
 24 statement that he "knew in the first part of November 2006 that Visa had agreed to waive
 25 liquidated damages and that the parties had agreed, in light of the numerous problems,
 26 difficulties and delays encountered with the Visa project, that Maritz was proceeding on a 'best
 27 efforts' basis," is tied into his statement in paragraph 6 of his Declaration that he "was very
 28 surprised" to learn on July 23, 2007 that Visa was claiming Maritz owed tens of millions of

1 dollars and is proper under FRE 701 and 704. There is no requirement that the Declaration
 2 contain the additional detail Visa seeks. Visa's objections go to the weight of the evidence rather
 3 than admissibility, and Visa can pursue additional detail through discovery.

4 **DECLARATION OF KELVIN TAYLOR**

5 **1. Evidence to Which Visa Objects: Paragraph 5 (2:17-20):** Visa has objected to
 6 the second sentence in Paragraph 5 of the Declaration of Kelvin Taylor. To put the evidence into
 7 proper perspective, set forth below are Paragraphs 4 and 5 of the Taylor Declaration:

8 "4. On July 23, 2007, I learned that Visa's lawyer, Rod Thompson, had told
 9 Steve Gallant of Maritz earlier that day that Visa was claiming Maritz owed Visa tens of
 10 millions of dollars. I was very surprised to hear this.

11 5. To my knowledge, no one from Visa had previously made any such claim.
 12 In addition, such a claim seemed inconsistent with the facts that (a) Visa and Maritz had
 13 been proceeding on a best efforts basis since at least the Fall of 2006 and (b) I understood
 14 in November of 2006 that Visa had agreed to waive liquidated damages under the
 15 Agreement."

16 **Maritz's Response:** Visa's objections to the second sentence of paragraph 5 should be
 17 overruled. The evidence is relevant because it reflects the understanding of Mr. Taylor – who
 18 was then the President of Maritz Loyalty Marketing – that the parties had been proceeding on a
 19 best efforts basis since at least the Fall of 2006 and that Visa had agreed in November 2006 to
 20 waive liquidated damages under the Master Services Agreement. This, in turn, helps to show
 21 that Maritz reasonably believed, as of July 9, 2007 – when Visa was inducing Maritz into
 22 agreeing to arbitrate – that Visa was not and would not be claiming that Maritz owed Visa tens of
 23 millions of dollars and/or that liquidated damages had supposedly been accruing since the Fall of
 24 2006.

25 Paragraph 5 of the Taylor Declaration, viewed in light of the other evidence contained in
 26 the Taylor Declaration, as well as in the Gallant, Lyons and Peterman Declarations, provides the
 27 factual backdrop indicating that Visa deliberately concealed that it would be seeking tens of
 28 millions of dollars from Maritz and/or claiming that liquidating damages were continuing to

1 accrue. Other evidence (if necessary) will show that Doris Lyons, the Chief Operating Officer
 2 of the Maritz Loyalty Marketing Division, advised Mr. Taylor on November 9, 2006 of the
 3 agreement with Visa to proceed on a best efforts basis and for Visa not to impose the penalty
 4 clause (i.e., the liquidated damage provision) as the parties had mutually agreed in the
 5 November 8-9, 2006 emails, thus corroborating Mr. Taylor's Declaration. Visa's objections go
 6 to the weight of the evidence rather than admissibility, and to the extent Visa wants additional
 7 detail, it can seek such information through discovery.

8 Mr. Taylor's statements are also proper under FRE 701 and 704.

DECLARATION OF DORIS LYONS

10 **1. Evidence to Which Visa Objects: Paragraph 2 (2:4-8):** "In the Fall of 2006,
 11 both I and others at Maritz had various discussions and communications with Visa relating to the
 12 Visa Extras Rewards Program project. One topic discussed was what the parties (i.e., Maritz and
 13 Visa) should do in light of the many difficulties, problems, and delays in connection with the
 14 project, including difficulties caused by Visa and its then-current vendor, Carlson Marketing
 15 ("Carlson")."

16 **Maritz's Response:** Visa's objections on foundational, FRE 104(b) and "vague and
 17 conclusory" grounds all go to the weight of the evidence rather than admissibility. There is no
 18 requirement that the Declaration contain the amount of detail that Visa seems to want, and Visa
 19 can seek the additional detail through discovery if it so chooses.

20 Ms. Lyons' statements are proper under FRE 401, 402 and 701; *see also* FRE 801(d)(2),
 21 803(1) and (3), 804(b)(3), and 807. It is not necessary for the Lyons Declaration to itemize each
 22 of the difficulties, problems and delays in connection with the Visa project.

23 **2. Evidence to Which Visa Objects: Paragraph 4 (2:13-22):**^{1/} "Maritz was
 24 concerned because of the many problems, delays and difficulties being encountered and made
 25 clear to Visa that Maritz would need assurances that Visa would not hold Maritz accountable if
 26 Maritz was going to continue to proceed under Visa's tight timeframe. Both I and others at

27 ^{1/} Although Visa indicates it objects to "Paragraph 4 (2: 13-22)" of the Lyons Declaration, Visa's objections appear
 28 to be limited only to Paragraph 4 (2: 13-17).

1 Maritz conveyed our concerns to (among others) Mr. Edward “Tad” Fordyce of Visa. Mr.
 2 Fordyce was a management-level Visa employee who was operating as a program manager for
 3 Visa with respect to Visa’s Rewards Program project. As set forth in Section VI.J. of the Master
 4 Services Agreement dated April 17, 2006 (the “Agreement”), Maritz was entitled to rely on
 5 communications from Mr. Fordyce with respect to the project, as well as from any of his superior
 6 officers (one of whom was Visa’s Tim Attinger). A copy of Section VI.J. of the Agreement is
 7 attached to my Declaration as Exhibit 1.”

8 **Maritz’s Response:** Each of Visa’s objections should be denied. Ms. Lyons’ statements
 9 are proper under FRE 401, 402 and 701; *see also* FRE 803(1) and (3), and 807. Visa’s
 10 objections go to the weight of the evidence rather than admissibility. There is no requirement
 11 that Maritz include in a written declaration the amount of detail that Visa claims is necessary.
 12 There is, for example, no requirement that the Lyons Declaration describe precisely how she
 13 conveyed certain concerns to Mr. Fordyce of Visa, or that she describe specifically what she said
 14 in her conversations with him. Visa can seek additional detail through discovery if it so chooses.

15 Visa’s “best evidence” objection is also without merit. Ms. Lyons’ Declaration is not
 16 purporting to summarize any particular document.

17 **3. Evidence to Which Visa Objects: Paragraph 5 (2:23-3: 2):** “As a result of
 18 Maritz’s concerns and the delays, problems and difficulties encountered in connection with the
 19 project, Maritz and Visa agreed on November 8-9, 2006, that the parties would proceed on a best
 20 efforts basis and that the penalty clause (i.e., the “liquidated damages” provision) of the parties’
 21 Agreement would not be imposed.... These emails reflect the parties’ agreement to proceed on a
 22 best efforts basis and that Visa waived its right to liquidated damages in connection with the
 23 parties’ Agreement.”

24 **Maritz’s Response:** Ms. Lyons’ statements in Paragraph 5 of her Declaration are
 25 proper. The Declaration need not lay out each and every fact upon which Ms. Lyons bases her
 26 statements, and her testimony is proper under FRE 701 and 704. If Visa wants to flesh out the
 27 underlying details, it should do so through discovery.

1 Visa's objections also conveniently omit the reference to Exhibit 2 that is attached to the
2 Lyons Declaration. More specifically, Visa has omitted from its quotation of Paragraph 5 of the
3 Lyons Declaration the sentence that says "a true and accurate copy of the emails exchanged
4 between Mr. Fordyce and me dated November 8 and 9, 2006 are attached hereto as Exhibit 2."
5 The Lyons Declaration thus attaches the "best evidence" as Exhibit 2. Ms. Lyons is permitted to
6 testify as to both her understanding of the November 8-9, 2006 emails and the concerns, delays
7 and problems which resulted in the agreement contained in the November 8-9, 2006 emails. See
8 FRE 402, 701, 704, 801(d)(2), 803(1), 804(b)(3) and 807.

9 Respectfully submitted,

10 Dated: February 19, 2008

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